Mass Harvest Sdn Bhd v Syarikat Perniagaan Dasra Sdn Bhd & Ors

HIGH COURT (SIBU) — SUIT NO 22-14 OF 2004
HAMID SULTAN JC
30 JULY 2008

Contract — Building contract — Breach — Repudiation of subcontract — Vide a subcontract agreement, plaintiffs substituted themselves as main contractor — Liability of plaintiffs — Whether plaintiffs wrongfully repudiated subcontract agreement — Whether plaintiffs' action premature for want of completion — Whether plaintiffs given option to stop contract works — Whether damages claimed were itemised intelligently to bring claim within scope and parameters of subcontract agreement

The first defendant was the main contractor for the Government of Malaysia (JKR) ('the government') for the construction and completion of an extension to SMK Selirik, Kapit, Sarawak. The second and third defendants were the director and the project manager of the first defendant, respectively. The plaintiffs were the subcontractors for the said contract works. The first defendant had, vide the subcontract agreement, assigned all their rights, obligations and liability to the plaintiffs, save that their interest was only towards a monetary claim limited to a commission of 7.9% received from the government. The plaintiffs and the first defendant agreed that all cheque payments received from JKR shall be deposited into the project account and shall be divided between them at the rate of 92.1% and 7.9%, respectively. The plaintiffs alleged, inter alia, that the first defendant had failed to pay them a sum RM1,618,996.96 being the balance contract price having completed approximately 90% of the contract work. They further alleged that the first defendant had changed the instructions given to the bank, which resulted in the bank overpaying the first defendant and underpaying the plaintiff, by a total sum of RM230,772.84. The defendants however, denied and disputed that the plaintiffs had completed approximately 90% of the contract work. They also counterclaimed for indemnity in full for the amount of liquidated and ascertained damages incurred by the first defendant due to the plaintiffs' repudiation of the subcontract agreement.

Held, allowing the plaintiffs' claim with costs:

(1) The plaintiffs by the subcontract agreement had substituted themselves

as the main contractor and in consequence, it was in their own interest not to repudiate the agreement when the payment was duly being made by the government according to the progress of the construction work (see para 4).

(2) As the rights and liabilities of the plaintiff and defendants' were interlinked with the government contract, the conduct of the plaintiff in terminating the subcontract agreement, has made it impossible for the court to determine precisely the amount of work that was completed by the plaintiff taking into consideration there was no certificate to show the amount of work actually completed by the plaintiff. The legal burden was on the plaintiff to prove the amount claimed. The court could not rely on speculation or surmise (see para 6(b)).

(3) For the parties to sue on the subcontract agreement they must specify the breach under the specific clause and itemise their claim and adduce sufficient evidence in law to justify the claim. In this case, that was not done and this was no surprise because the nature of the subcontract agreement was primarily based on the payment from the government and any claim the government may have against the defendants, which the plaintiffs were required to indemnify. The facts of the instant case would appear to fall within the phrase the 'loss lies where it falls' notwithstanding the subject matter relates to contractual obligation (see para 6(d)).

[Bahasa Malaysia summary

Defendan pertama adalah kontraktor utama untuk Kerajaan Malaysia (JKR) ('kerajaan') untuk pembinaan dan penyiapan binaan tambahan kepada SMK Selirik, Kapit, Sarawak. Defendan kedua dan ketiga masing-masing merupakan pengarah dan pengurus projek defendan pertama. Plaintif-plaintif merupakan subkontraktor untuk kerja kontrak tersebut. Defendan pertama telah memberikan kesemua hak, kewajipan dan liabiliti kepada plaintif melalui perjanjian subkontrak, kecuali kepentingan mereka terhadap tuntutan wang yang terhad kepada komisen 7.9% yang diterima daripada kerajaan. Plaintif dan defendan pertama bersetuju yang semua bayaran cek yang diterima daripada JKR akan dimasukkan ke dalam akaun projek dan akan dibahagikan antara mereka masing-masing pada kadar 92.1% dan 7.9%. Plaintif mengatakan, antara lain, defendan pertama telah gagal membayar kepada mereka sejumlah RM1,618,996.96 iaitu baki harga kontrak setelah menyiapkan lebih kurang 90% daripada kerja kontrak. Mereka selanjutnya mengatakan yang defendan pertama telah menukar arahan yang diberikan kepada bank, yang mengakibatkan bank terlebih bayar defendan pertama dan terkurang bayar plaintif, jumlah keseluruhan sebanyak

RM230,772.84. Walau bagaimanapun defendan telah menafikan dan mempertikaikan yang plaintif telah menyiapkan lebih kurang 90% kerja kontrak. Mereka juga menuntut balas untuk indemniti sepenuhnya untuk jumlah ganti rugi boleh dikira dan ditentukan yang ditanggung oleh defendan pertama akibat penolakan perjanjian subkontrak plaintif.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Plaintif melalui perjanjian subkontrak telah menggantikan diri mereka sebagai kontraktor utama dan akibatnya, ia adalah demi kepentingan mereka sendiri untuk tidak menolak perjanjian itu apabila bayaran telah dibuat oleh kerajaan mengikut perkembangan kerja pembinaan (lihat perenggan 4).

(2) Memandangkan hak dan liabiliti plaintif dan defendan berkaitan dengan kontrak kerajaan, perlakuan plaintif menamatkan perjanjian subkontrak, menjadikan ia mustahil untuk mahkamah menentukan dengan tepat jumlah kerja yang telah disiapkan oleh plaintif dengan mempertimbangkan tiada sijil untuk menunjukkan kerja sebenar yang telah disiapkan oleh plaintif. Beban undang-undang adalah pada plaintif untuk membuktikan jumlah yang dituntut. Mahkamah tidak boleh bergantung kepada spekulasi atau tekaan (lihat perenggan 6(b)).

(3) Pihak yang menyaman berdasarkan perjanjian subkontrak mesti menentukan pelanggaran di bawah klausa tertentu itu dan menyenaraikan tuntutan mereka dan mengemukakan keterangan yang mencukupi di sisi undang-undang bagi menjustifikasikan tuntutan. Dalam kes ini, ini tidak dilakukan dan ini tidak memeranjatkan kerana sifat perjanjian subkontrak terutamanya adalah berdasarkan bayaran daripada kerajaan dan apa-apa tuntutan yang mungkin kerajaan ada terhadap defendan, yang plaintif dikehendaki membayar ganti rugi. Fakta kes ini kelihatan terangkum dalam ungkapan 'loss lies where it falls' meskipun perkara yang dipersoalkan berkaitan kewajipan kontraktual (lihat perenggan 6(d)).]

Notes

For cases on breach of building contract, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2763–2786.

Cases referred to

ABN-AMRO Bank Bhd v Ismail Mydinsah (trading as Ismy Classic) [2004] 7 MLJ 30 (refd)

Ban Hong Joo Mines Ltd v Chen & Yap Ltd [1969] 2 MLJ 83 (refd)

Fusing Construction Sdn Bhd v EON Finance Bhd & Ors [2000] 3 MLJ 95 (refd)

Hasmah bt Abdul Rahman v Kenny Chua Kien Lam [2006] 5 MLJ 236 (refd) A

Wong Ho Leng (Wong Ho Leng & Co) for the plaintiffs.
Siew Chen Fui (Awang Chua Voon Ting Ronald & Co) for the defendants.

Hamid Sultan JC: B

[1] This is my judgment in respect of the plaintiffs' ('subcontractor') claim against the defendants ('main contractor') in respect of a subcontract agreement relating to a government project. The defendants also have a counterclaim against the plaintiffs. C

[2] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination-in-chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial. D E

BRIEF FACTS (THE DEFENDANTS' VERSION) F

[3] The defendants say:

(i) the first defendant was the main contractor for the Government of Malaysia ('JKR') for the construction and completion of extension to SMK Selirik, Kapit Sarawak. The second defendant is and was the director of the first defendant and the third defendant was the project manager for the said project. The plaintiffs were the subcontractor for the said contract works; G

(ii) the plaintiffs and the first defendant agreed that all cheque payments received from JKR shall be deposited into the project account and shall be divided between the plaintiff and the first defendant as follows: plaintiff: 92.1% and first defendant: 7.9%; H

(iii) the plaintiff's claim as in paragraph 11(a) and (b) of its statement of claim avers that: I

> 11 in breach of Clauses 5 and 6 of the Agreement,

(a) the first defendant changed the instructions given to the bank which resulted in the bank overpaying the first defendant and underpaying the plaintiff by a total sum of RM230, 772.84; and

(b) the first defendant has failed, refused and/or neglected to pay the plaintiff for doing and completing 90%, more or less, of the contract works in that the plaintiff has only received the total sum of RM3,056,291.54 instead of 90% of the contract price in the sum of RM4,675,288.50, thus leaving a balance of RM1,618,996.96 unpaid (hereinafter collectively called 'the said breaches).

(iv) the plaintiffs also say that by reason of the said breaches and also by reason of the fraud of the first defendant and/or the second and third defendants a total sum of RM230,772.84 was unlawfully and fraudulently retained and paid to the second and third defendants to solve the matter of the consultant's fee and commission due to the second and third defendants;

(v) the plaintiffs also say that they are under no obligation whatsoever under the agreement or elsewhere to make any such payment to the second and third defendants;

(vi) the plaintiffs claim against the first, second and third defendants jointly and severally:

(a) the surety sum of RM282,238.25;

(b) the balance contract price of RM1,18,996.96 as at March, 2004;

(c) the sum of RM22,938.45 paid by the plaintiffs on behalf of the first defendant;

(d) the sum of RM136,167.25 for additional works carried out by the plaintiffs for the project;

(e) damages for breach of contract;

(f) general damages and interest etc;

(vii) the defendants deny and dispute that the plaintiff had completed 90%, more or less, of the contract works,

(viii) the defendants assert that the plaintiff had not proceeded regularly and diligently with the contract works and the revised completion date for the contract works expired on the 1 March 2004 but on the 31 March 2004 the plaintiff achieved only 81.61% completion;

(ix) on the 20 April 2004 JKR had issued to the first defendant a certificate of non-completion and liable to pay RM2,500 per week as part thereof as liquidated and ascertained damages for the period during which the said works/section of works shall so remain and have remained incomplete;

(x) as a result of the plaintiffs wholly suspending the execution of the works and removal of all the plant and equipment from the work site and dismantling of the workers' quarters at the work site, the first defendant vide its letter dated 23 April 2004 gave notice to the plaintiff to remedy the aforesaid default within 14 days. On or about 23 April 2004, the plaintiffs served its writ of summons and the statement of claim dated 15 April 2004;

(xi) by the plaintiffs' conducts in serving the writ of summons and statement of claim dated 15 April 2004 on the defendants and coupled with the facts that the plaintiff had stopped works and abandoned the work site, the plaintiff has evinced an intention no longer to be bound by and has wrongfully repudiated the subcontract agreement;

(xii) the first defendant accepted the plaintiffs' repudiation of the subcontract agreement without prejudice to all its rights and remedies for such wrongful repudiation and/or breach of contract by the plaintiff

(xiii) the defendants deny that they were guilty of fraud and that a total amount of RM205,000 was retained by the first defendant from JKR payment towards part settlement of the indebtedness of the plaintiffs to the and third defendants of the balance of the consultant fees and the commission pursuant to the statement of undertaking in favour of the second defendant and the memorandum of agreement for payment of commission in favour of the third defendant executed by the plaintiff;

(xiv) the first defendant also contends that, if such deduction of RM205,000 towards part payment of the consultant's fees and commission be in breach of the provisions of the subcontract agreement, the plaintiffs by its conduct, (ie, the plaintiffs' letter dated 8 January 2004 had agreed not to stop work on the ground of the deduction of the consultant fees and commission] has waived and/or is now estopped from relying on such breach;

(xv) the defendants counterclaim against the plaintiff for:

(i) indemnity in full the amount of liquidated and ascertained damages incurred by the first defendant;

(ii) general damages for repudiation of contract;

(iii) the balance of consultant fees of RM30,000 to the second defendant and commission of RM45,000 to the third defendant; and

(iv) interest and costs etc.

PRELIMINARIES

[4] One witness gave evidence for the plaintiffs and two witnesses for the defendants. The reading of the subcontract agreement will clearly show that in principle the defendants have assigned all their rights, obligations and liabilities to the plaintiffs, save that their interest is only to a monetary claim limited to a commission of 7.9% from the monies received from Government of Malaysia. In consequence, for the plaintiffs to sue on the agreement for balance sum for work done, essentially will depend on the money received from the Government of Malaysia as well as liability attached to it such as payment of damages for non-completion of work within the time period, and claim in respect of defects during the warranty period etc. Thus, it will appear that the plaintiffs by the subcontract agreement has substituted themselves as the main contractor and in consequence, it is in their own interest not to repudiate the agreement when the payment is duly being made by Government of Malaysia according to the progress of the construction work. If the plaintiffs repudiate the contract, it will be difficult because of the nature of the subcontract terms to ascertain the claim without proper settlement of accounts with Government of Malaysia. In such circumstance, it may appear if repudiation is wrongful or unwarranted, the loss may lie where it falls.

In crux, this is not a case of unconditional contract between the plaintiffs and the defendants. This is a case of conditional contract and in consequence, the remedies for the plaintiffs may be limited.

[5] The defendants say the issues to be determined are as follows:

> 1(a) whether the sum of RM230,772.84 overpaid to the first defendant constitutes a fundamental breach of the subcontract agreement which entitled the plaintiff to repudiate the subcontract agreement? and (b) whether the said sum of RM230,772.84 was unlawfully and fraudulently paid to the second and third defendants in view of the statement of undertaking to pay consultant fees to the second defendant and the memorandum of agreement to pay commission to the third defendant; (2) who actually wrongfully repudiated the subcontract agreement? Whether the conducts of the plaintiff in stopping the works, removed the plants and machineries from the work site and dismantled the workers' quarters coupled with the filing and service of the writ of summons against the defendants constitutes wrongfully repudiation of the subcontract agreement? (3) Whether the plaintiff's action is premature as the contract works has not been completed?

Whether the plaintiff has completed 90% of the works? (4) Whether the plaintiff entitled to claim the surety/performance bond in the sum of RM282,238.25 and the retention sum of RM282,238.25 and whether it is prematured? (5) Whether the sum of RM136,167.25 for additional works carried out by the plaintiff has been paid under payment certificate No 10, whether it is a double claim? (6) whether it was the contractual duty for the plaintiff to pay for the costs of Contractor's All Risks Insurance Premium, re-site LT Pole ('SESCO'), re-site LT Pole ('TELEKOM'); (7) whether the plaintiff should honour their promised to pay consultant fees to the second defendant and commission to the third defendant; (8) whether the plaintiff is liable to indemnify the first defendant for the liquidated ascertained damages imposed by JKR?

[6] I have gone through the evidence, documents and submissions of the parties in detail. I take the view that the plaintiffs' claim must be allowed partly. My reasons are as follows:

(a) The plaintiffs' claim for surety bond of RM282,238.28 was paid for and on behalf of the defendants. This is specifically stated in para 2 of the subcontract agreement. That part reads as follows:

> In consideration of matters herein stated and the Sub-Contractor providing or having provided the surety in the sum of RM282,238.25 on behalf of the Contractor under Jabatan Kerja Raya's letter to the Contractor dated 27/7/2002, the contractor hereby IRREVOCABLY appoints the Sub-Contractor to be the sole and exclusive Sub-Contractor to do and perform and complete the Contract works.

There is no where in the defence or in the said subcontract agreement which allows the said sum to be absolved by the defendants, more so when the plaintiffs under the contract is given the option to stop contract work as set out in cl 11 of the subcontract agreement, under the caption 'default of contractor'. Further, the liability of subcontractor is spelled out in cl 8 of the subcontract agreement and the said part does not permit the defendants to benefit out of surety bond. Clause 8 reads as follows:

(a) The subcontractor shall observe, perform, discharge and comply with all the provisions of the Government Agreement on the part of the contractor to be observed, performed, discharged and compiled with as far as they relate and apply to the contract works as if all the same were severely set out herein.

(b) The subcontractor shall be liable for and indemnify the contractor against all or losses sustained by the contractor and against all losses and claims for injuries or damage to persons or damage to any property whatsoever which may arises out of

A or in consequence of the execution of the Contract Works. Such indemnity shall include all claims, proceedings, damages, costs, charges and expenses whatsoever in respect of or in relation thereto.

B (c) The subcontractor shall be liable for any damage or compensation payable at common law or under any statute in respect of or in consequence of any accident, illness or injury to any workman or other person in the employment of the subcontractor, save and except for accident, illness or injury resulting solely from any act or default of the contractor.

C It is important to note that the defendants' claim or defence if any, in relation to breach of the subcontract agreement must be substantially based on cl 8 of the subcontract agreement and must be itemised intelligently to bring the claim within the scope and D parameters of cl 8. In this case, I take the view this was not done, sufficient for the court to take cognizance of the defendants' claim. In my view it is fatal.

(b) The plaintiffs' claim for balance of contract price of E RM1,618,996.85 as at March 2004 has not been proven according to law in the manner asserted by the plaintiffs, which must be subject to the subcontract agreement and any liabilities to be paid to Government of Malaysia. In this case, the plaintiffs complain that in breach of the subcontract agreement, the first F defendant changed the instructions given to the bank which resulted in the bank overpaying the first defendant and underpaying the plaintiffs by a total sum of RM230,722.84. Even, if the defendant had been over paid as claimed, I take the view that such a breach does not permit the plaintiffs to conduct itself in a G manner which clearly evinced an intention to terminate the subcontract agreement. The conduct of the plaintiffs to act in a surreptitious manner, when the rights and liabilities of the plaintiffs as well as that of the defendants' is interlinked with the government contract, has made it impossible for the court to H actually determine exactly the amount of work which was completed by the plaintiffs taking into consideration there was no certificate to show the amount of work actually completed by the plaintiffs as the defendants say that because of the termination they had to complete the work. The legal burden is on the I plaintiffs to prove the amount claim. The court cannot rely on speculation or surmise.

(c) Further in the pleadings' the plaintiffs claim a sum of RM1,618,996.85 but in the submission the plaintiffs say they are entitled to RM863,967.68 at least. However, the plaintiffs did not

allude on other liabilities attached to its right and claim such as agreed damages for late completion, claim related to defect liability period, etc. It is not for the court to investigate and determine the award, but it is for the plaintiffs to prove their claim. And that claim cannot be derived on the facts of this case by a mathematical formula and that too without the full completion of the project as well as settlement of accounts with JKR.

(d) As I had made some observation in 'preliminaries above', it is my finding that the conduct of the plaintiffs' amount to repudiatory breach ie, the plaintiffs had repudiated its contractual obligations. The learned authors of *Pollock & Mulla, on Contract* (10th Ed) at p 398 observed:

> 'A repudiation', said Lord Atkin in *Spettabile Consorzio Veneziano v Northumberland Shipbuilding Co* 'has been defined in different terms — by Lord Selborne as an absolute refusal to perform a contract; by Lord Esher as a total refusal to perform it; Bowen LJ, as a declaration of an intention not to carry out a contract when the time arrives, and by Lord Haldane as an intention to treat the obligation as altogether at an end. They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain his own intention not to perform the contract.
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> The clearest leading case is perhaps *Withers v Reynolds* (1831) 2 B & Ad 889; 36 RR 782.
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> The action was for not delivering straw to the plaintiff under an agreement whereby the defendant was to supply the plaintiff with straw from October 1829 to Midsummer 1830 in specified quantities, and the plaintiff was to pay a named sum per load 'for each load of straw so delivered', which the court read as meaning that he was to pay for each load on delivery. In January 1830, the straw having been regularly sent in, and the plaintiff being in arrear with his payments, 'the defendant called upon him for the amount, and he there-upon tendered to the defendant £11 11s being the price of all the straw delivered except the last load, saying that he should always keep one load in hand,' The defendant took this payment under protest, and refused to deliver any more straw unless it was paid for on delivery.
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> The court held that this gave the plaintiff no right of action, in other words that the defendant was entitled to put an end to the contract. As Parke J (as he was then, afterwards better known as Baron Parke), said,
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> > the substance of the agreement was that the straw should be paid for on delivery... When, therefore, the plaintiff said that he would not pay on delivery (as he did, in substance, when he insisted on keeping one load in hand), the defendant was not obliged to go on supplying

him. It is to be observed that, as Patterson J added, 'if the plaintiff had merely failed to pay for any particular load., that of itself might not have been an excuse to the defendant for delivering no more straw'.

Later English authorities have in fact established that mere failure to make one of a series of payments will not generally, in the absence of a prospective refusal, discharge the other party from proceeding with the contract.

(see *Ban Hong Joo Mines Ltd v Chen & Yap Ltd* [1969] 2 MLJ 83 FC).

This repudiation is of the nature which will permit the defendants to terminate the subcontract agreement and being conditional agreement, a claim for quantum merit will not be in order on the facts of this case. Further, for the parties to sue on the subcontract agreement they must specify the breach under the specific clause and itemise their claim and adduce sufficient evidence in law to justify the claim. In this case, it is my finding that was not done and this is no surprise because the nature of the subcontract agreement is primarily based on the payment from Government of Malaysia and any claim the Government of Malaysia may have against the defendants, which the plaintiffs are required to indemnify. The facts of the instance case will in my view, appear to fall within the phrase the 'loss lies where it falls' notwithstanding the subject matter relates to contractual obligation (see *ABN-AMRO Bank Bhd v Ismail Mydinsah (trading as Ismy Classic)* [2004] 7 MLJ 30, *Fusing Construction Sdn Bhd v EON Finance Bhd & Ors* [2000] 3 MLJ 95, *Hasmah bt Abdul Rahman v Kenny Chua Kien Lam* [2006] 5 MLJ 236).

(e) There is also one more issue in this case. The defendants had admitted that the plaintiffs had completed 81.61% of the works. That is to say that the plaintiffs are entitled to 81.61% of the contract price of RM5,194,765.00 subject to the ratio of 92.1:7.9 and also subject to the claims of Government of Malaysia. The working will read as follows:

CALCULATION

(i) 81.61% of RM5,194,765.00 will be RM4,239, 447.72

(ii) RM4,239,447.72 at the ratio of 92.1:7.9 = RM3, 904,531.35

(iii) The final amount as admitted by the defendants must necessarily read as RM3,904,531.35 less money paid to the plaintiffs, less any claim by Government of Malaysia. As the

claim, by Government of Malaysia, has not been accounted and/or accounts properly taken, the plaintiffs' claim can be said to be premature or one which cannot be entertained by the court, at this stage.

(f) In respect of the claim by the plaintiffs for the sum of RM23,938.45, in respect of disbursement, I do not find much merit or evidence to substantiate this head of claim, taking into consideration the plaintiffs' claim is based on subcontract agreement.

(g) On the issue of additional works, I accept the evidence and explanation of the defendants and hold that it is a non-issue.

[7] In respect of the defendants' counterclaim, I take the view directly or indirectly the agreement between the subcontract agreement between the plaintiffs and defendants had been brought to an end by conduct of the parties without proper adherence to contractual terms. In consequence, the defendants' counterclaim cannot be entertained in law for reasons stated above, taking into consideration that the claim is based on the subcontract agreement.

[8] For reasons stated above, I allow the plaintiffs' claim with costs for the sum of RM282,238.28 with interest at 8% per annum from the date of writ until date of judgment and thereafter at 8% per annum from the date of judgment until date of realisation. The getting up fees shall not exceed RM50,000. If costs cannot be agreed, the plaintiffs are at liberty to tax the costs. The defendants' counterclaim is dismissed with no order as to costs.

[9] I hereby order so.

Plaintiffs' claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed